IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17-13023

Alisha Coleman, Plaintiff-Appellant

v.

Bobby Dodd Institute,
Defendant-Appellee

On Appeal from
the United States District Court
for the Middle District of Georgia
Case No. 4:17-CV-00029-CDL

INITIAL BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant does not have a parent corporation and is not a publicly held corporation.

Interested parties are as follows:

Bobby Dodd Institute, Inc., Defendant-Appellee

Coleman, Alisha, Plaintiff-Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted in this case because it raises important legal issues regarding the scope of Title VII as amended by the Pregnancy Discrimination Act, and specifically, its application to women who are undergoing menopause, a condition that will ultimately impact nearly all working women who remain in the workforce until the typical age of retirement.

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JURISDICTIONAL STATEMENT

Jurisdiction is proper in this case under 28 U.S.C. § 1331, as this appeal arises from a judgment dismissing a civil action in the United States District Court for the Middle District of Georgia, alleging violations of Title VII, 42 U.S.C. § 2000e *et seq.* This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered a final judgment granting Bobby Dodd Institute, Inc.'s Motion to Dismiss on June 8, 2017. Doc. 12. A notice of appeal was timely filed on July 5, 2017. Doc. 15.

STATEMENT OF ISSUES ON APPEAL

(1) Whether the District Court erred in holding that premenopause and sudden-onset heavy menstruation associated with that condition are not protected as sex-linked traits under Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act;

(2) Whether the District Court erred in holding that premenopause and sudden-onset heavy menstruation associated with that condition are not "related to pregnancy and childbirth" under Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act;

(3) Whether the District Court erred in requiring Ms. Coleman to identify a similarly situated male comparator in order to survive a motion to dismiss, in

contravention of this Court's decision in *Smith v. Lockheed-Martin Corporation*, 644 F.3d 1321, 1327-28 (11th Cir. 2011); and

(4) Whether the District Court erred in accepting the employer's proffered reason for Ms. Coleman's termination on a motion to dismiss and thus depriving her of the opportunity to prove that reason was a pretext for unlawful discrimination, in contravention of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Ms. Coleman was terminated on April 26, 2017, and timely filed a charge of discrimination with the Equal Employment Opportunity Commission on October 13, 2016. She received a Notice of Right to Sue on November 17, 2016. Doc. 1, Ex. B. Ms. Coleman, represented by different counsel at the time, filed a complaint in the Middle District of Georgia, Columbus Division, on January 31, 2017. On February 28, 2017, Defendant moved to dismiss. Doc. 6. The District Court granted Defendant's motion on June 8, 2017. On July 5, 2017, Ms. Coleman, represented by new counsel, filed the instant appeal.

II. STATEMENT OF FACTS

Plaintiff-Appellant Alisha Coleman was, until shortly before this suit was filed, employed as an E-911 Call Taker by Bobby Dodd Institute, Inc. (BDI), a job training and employment agency located in Fort Benning, Georgia that serves people with disabilities. Doc. 1, ¶ 2. Ms. Coleman had worked for BDI and its predecessor since June 13, 2007. *Id.* ¶ 9. Ms. Coleman, at the time the events at issue transpired, had begun going through menopause, and as a result, experienced irregular and unpredictable sudden onset menstrual periods, which could be heavy at times.[1] *Id.* ¶¶ 10-11. Ms. Coleman kept extra quantities of sanitary products at work as a precaution. *Id.* She had communicated with Defendant about her condition, and Defendant's personnel had advised her to keep extra sanitary products on hand. *Id.* ¶ 12.

In August 2015, Ms. Coleman unexpectedly experienced a sudden onset of her menstrual period that resulted in her accidentally leaking menstrual fluid on her office chair. Doc. 1, ¶ 14. Ms. Coleman reported the event to her supervisor, the Site Manager, who told her to leave the premises to change clothing, which she

[1] As explained further below, irregular and abnormally heavy menstruation are common symptoms experienced by women going through menopause. *See generally*, Am. Coll. of Obstetricians and Gynecologists, FAQ162, *Perimenopausal Bleeding and Bleeding after Menopause* (May 2011) *available at* https://www.acog.org/Patients/FAQs/Perimenopausal-Bleeding-and-Bleeding-After-Menopause.

did. *Id.*, Ex. A. Approximately one or two days later, the Site Manager and the Human Resource Director gave her a disciplinary write up, and warned her "that she would be fired if she ever soiled another chair from sudden onset menstrual flow." *Id.* ¶ 15 & Ex. A.

Ms. Coleman attempted to take extra precautions to ensure that another incident did not occur. However, on April 22, 2016, Ms. Coleman got up to walk to the bathroom and some menstrual fluid unexpectedly leaked onto the carpet. *Id.* ¶¶ 20-21. She immediately cleaned the spot with bleach and disinfectant. Doc. 1, ¶ 22. Soon thereafter, the Site Manager directed the Site Supervisor to relieve Ms. Coleman from duty, although she was scheduled to work shifts over that weekend (April 23 and April 24). *Id.* ¶ 23 & Ex. A. On April 25, she received a call telling her to report to her job site on April 26. *Id.* Ex. A. When she reported to work on April 26, she was terminated. The stated reason for her termination was her alleged failure to "practice high standards of personal hygiene and maintain a clean, neat appearance while on duty." *Id.* ¶ 24 & Exs. A, C.

Ms. Coleman filed suit, alleging violations of Title VII, and Defendant moved to dismiss under Rule 12(b)(6). The District Court granted Defendant's motion, finding that Ms. Coleman's Complaint failed to state a claim under Title VII. Doc. 12. Although Ms. Coleman had characterized her termination as being due to the condition of premenopause, the Court narrowly recharacterized her

Complaint as challenging her termination on the basis of "excessive menstruation," a phrase that appears nowhere in the Complaint. Doc. 12, p.5. The Court then found that her condition was not subject to protection under Title VII as a matter of law. The Court acknowledged that "early Supreme Court precedent interpreting the [Pregnancy Discrimination Act] could be construed to extend this protection to uniquely feminine conditions beyond pregnancy, such as pre-menopausal menstruation," and that "a non-frivolous argument can be made that it is unlawful for an employer to treat a uniquely feminine condition, such as excessive menstruation, less favorably than similar conditions affecting both sexes, such as incontinence." Doc. 12, p.4-5. But the Court ultimately rejected this argument, reasoning that her claims were without merit because she had failed to assert "that her excessive menstruation was treated less favorably than similar conditions affecting both sexes." Doc. 12, p.5; *see also id*., p.6 ("There is no allegation that male employees who soiled themselves and company property due to a medical condition, such as incontinence, would have been treated more favorably."). The Court determined that her allegation that "her termination would not have occurred but for a uniquely feminine condition" was not by itself sufficient "to show that she was terminated because of her sex." Doc. 12, p.5. According to the District Court, "[n]othing in the text of Title VII, the [Pregnancy Discrimination Act], or case law interpreting these Acts supports such a broad interpretation of the law."

Id. The Court further rejected the argument that her premenopause or—in the Court's words—her "excessive menstruation" were "related to pregnancy or childbirth" under the text of the Pregnancy Discrimination Act (hereinafter "PDA"), reasoning that the "excessive menstruation was related to pre-menopause, not pregnancy or childbirth." *Id.*

Finally, the Court mechanically accepted, on a motion to dismiss posture, Defendant's stated reason for firing Ms. Coleman for her termination—finding that she was terminated not because of her condition of premenopause as Ms. Coleman specifically alleged in the Complaint, but "for being unable to control the heavy menstruation and soiling herself and company property." Doc. 12, p.6.

III. STANDARD OF REVIEW

The 11th Circuit Court of Appeals reviews a district court's ruling on a 12(b)(6) motion to dismiss for failure to state a claim *de novo*, applying the same standard as the district court. *Castillo v. Allegro Resort Mktg.*, 603 F. App'x. 913, 915 (11th Cir. 2015). To survive a 12(b)(6) motion to dismiss, the complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This standard is met when the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). When determining whether a complaint meets this plausibility standard, the court must accept the facts in the complaint as true and must view them in the light most favorable to the plaintiff. *See Twombly*, 550 U.S. at 555; *Castillo*, 603 F. App'x. at 915.

The complaint does not need to contain "detailed factual allegations," but simply sufficient factual content to allow the court to draw a reasonable inference that the defendant is liable. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). The plausibility standard does not "impose a probability requirement at the pleading stage," and a complaint may proceed even if the court suspects that uncovering actual proof of the pleaded facts is improbable and recovery is unlikely. *Twombly*, 550 U.S. at 556. Additionally, the complaint need not be a "model of the careful drafter's art" nor must it accurately detail a "precise legal theory." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). Indeed, "Federal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted[, because] imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2).'" *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346 (2014) (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002)); *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1245-46 (11th Cir. 2015) (finding that

the District Court abused its discretion in failing to apply the *Iqbal/Twombly* plausibility standard to a Title VII race discrimination complaint).

SUMMARY OF ARGUMENT

The District Court's decision should be reversed because its legal conclusion is contrary to the text and history of the Pregnancy Discrimination Act and contravenes binding case law from the Supreme Court and this Circuit recognizing that sex-linked traits related to women's reproductive capacity are covered under Title VII. The decision also improperly required Ms. Coleman's Complaint to satisfy proof requirements that do not apply at the motion to dismiss stage, and misconstrued Ms. Coleman's Complaint in favor of Defendant by crediting its proffered justifications for firing her.

Ms. Coleman alleges that she was terminated as a result of symptoms associated with her condition of premenopause. These allegations clearly state a claim under Title VII for two independent reasons. First, Title VII prohibits *any* kind of discrimination that is "because of . . . sex." 42 U.S.C. § 2000e-2. While the statute explicitly defines discrimination on the basis of sex as including "pregnancy, childbirth, and related medical conditions," 42 U.S.C. § 2000e(k), it also specifies that sex discrimination is "not limited to" those enumerated bases. Indeed, discrimination on the basis of sex-linked conditions constitutes the very

type of conduct Congress intended to prohibit when it amended Title VII through enacting the PDA. *See Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 678 (1983). Accordingly, it is well-established that the PDA applies not only to pregnancy itself, but also to sex-linked conditions linked to women's reproductive capacity, such as the ability to become pregnant, infertility, and regularity of the menstrual cycle. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206, 211 (1991); *Hall v. Nalco*, 534 F.3d 644, 648-49 (7th Cir. 2008); *Harper v. Thiokol Chemical Corp.*, 619 F.2d 489, 491-92 (5th Cir. 1980). Premenopause and its symptoms are, of course, included among such sex-linked conditions.

Second, premenopause and its symptoms constitute "medical conditions" that are "related to" the enumerated conditions of "pregnancy and childbirth," 42 U.S.C. § 2000e-2, and are thus expressly encompassed within the text of the PDA. This conclusion follows from the nature of the condition of menopause, which represents the termination of the period in a woman's life when she is able to become pregnant, and follows a line of cases interpreting the term "related to" pregnancy and childbirth as encompassing a host of similarly associated conditions. *See Equal Emp't Opportunity Comm'n v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (lactation is "related to" pregnancy and childbirth); *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008)

(abortion is "related to" pregnancy and childbirth); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402-03 (N.D. Ill. 1994) (infertility is "related to" pregnancy and childbirth).

The Court's ruling was also erroneous because it hinged on Plaintiff's failure to include allegations that satisfied the elements of the *McDonnell Douglas prima facie* case, and specifically, to identify a male comparator. As the Supreme Court and this Court have made clear, a plaintiff need not allege a *prima facie* case in order to survive a motion to dismiss. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002); *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1245-46 (11th Cir. 2015). Nor is it necessary to identify a male comparator in order to establish that an employer's adverse actions were taken "because of sex." *Hamilton v. Southland Christian Sch. Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

Finally, the District Court erred in accepting, on a motion to dismiss, Defendant's stated reason for Ms. Coleman's termination—her alleged "failure to maintain high standards of personal hygiene," Doc. 12, p.3—rather than accepting as true the reasons alleged in the Complaint—her sex-linked condition of premenopause and its symptoms. Doc. 1, ¶¶ 10-13, 24. The Court's failure to apply the correct standard deprived her of the opportunity, guaranteed at the pleading stage, to gather evidence to rebut Defendant's proffered reason for her termination

and ultimately prove that discrimination was the true motive. *McDonnell Douglas*, 411 U.S. at 802-05. For all these reasons, this Court should reverse and vacate the District Court's decision and remand the case for further proceedings.

ARGUMENT

I. PREMENOPAUSE AND ITS SYMPTOMS ARE PROTECTED CONDITIONS UNDER TITLE VII.

A. The Complaint Properly Asserts Claims of Wrongful Termination Based on the Sex-Linked Condition of Premenopause and its Symptoms.

The District Court held that Ms. Coleman's allegation that she was terminated on the basis of "excessive menstruation" or could not, as a matter of law, state a claim under Title VII. Doc. 12, p.5. As a threshold matter, this ruling misconstrues Plaintiff's allegations as well as the applicable law.

The heart of Ms. Coleman's Complaint is that she was fired because of her condition of "pre-menopause,"[2] a condition characterized by unpredictable, sudden-onset, and heavy menstrual periods. Doc. 1, ¶¶ 10-11. While the Court initially accurately referenced her allegations as relating to "pre-menopausal

[2] The Complaint refers to her condition as "pre-menopause," which, as discussed, *infra* at p.4, is a colloquial term for the condition of "perimenopause," the time during which a woman begins to undergo physiological changes before she enters menopause. This Brief uses the colloquial term "premenopause," or references her "undergoing menopause," because that is the terminology Ms. Coleman uses in her Complaint. Doc. 1, ¶ 10.

menstruation," Doc. 12, p. 1, it ultimately construed her Complaint as alleging that she was fired for "excessive menstruation," Doc. 12, p.5, a term not included anywhere in the Complaint. Indeed, the Complaint specifies that "Defendant did not . . . counsel and punish other females for the sequelae of heavy menstrual flow," Doc.1, p.18; this makes clear that it is *not* her allegation that she was fired simply because she was viewed as having "excessive menstruation."

The Court's characterization suggests that there is some "normal" level of menstruation that women are expected to experience. While it is unclear whether and to what extent this characterization reflects a value judgment regarding Ms. Coleman's condition or Defendant's alleged motive for firing her, it obviously falls outside the four corners of the Complaint. Certainly, Defendant's views regarding "normal" versus "excessive" levels of menstruation and their implications may be explored in discovery or at trial. Defendant's views regarding menstruation itself are similarly proper subjects of discovery, as the topic is one that is historically and currently subject to numerous taboos and negative stereotypes.[3] However, it was improper for the Court to recast Ms. Coleman's Complaint at the motion to dismiss stage, when the District Court was bound to accept her allegations regarding the

[3] *See generally* Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as A Priority for Achieving Gender Equality*, 21 Cardozo J.L. & Gender 1 (2014) (discussing cultural taboos surrounding menstruation).

reasons for her termination at face value. This Court should therefore view Plaintiff's Complaint as asserting claims based on premenopause and its associated symptoms, rather than on "excessive menstruation," or whatever is implied by the Court's mischaracterization of Ms. Coleman's condition as such. Properly construed, the Complaint asserts viable claims under Title VII and the Pregnancy Discrimination Act.

B. The PDA Prohibits Discrimination on the Basis of Sex-Linked Conditions Such as Premenopause.

1. The PDA was enacted to extend protection to conditions linked to sex.

Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act, prohibits discrimination on the basis of sex-linked conditions such as premenopause. Under Title VII, covered employers are prohibited from discriminating against "any individual" "because of such individual's . . . sex," 42 U.S.C. § 2000e-2. The Pregnancy Discrimination Act defines sex discrimination broadly, specifying that "[t]he terms 'because of sex' or 'on the basis of sex' include, *but are not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (emphasis added). This inclusive language indicates that pregnancy, childbirth, or related medical conditions are not the *sole* conditions that might constitute prohibited sex discrimination, but rather, constitute a non-exhaustive list of forms that sex

discrimination commonly takes. *See, e.g.*, *Johnson Controls*, 499 U.S. at 206, 211 (remarking that its ruling that Title VII reaches discrimination on the basis of women's capacity to become pregnant "do[es] no more than hold that the PDA means what it says"). In other words, discrimination because of "sex" encompasses discrimination based not only on pregnancy—a condition that is linked to sex—but also on other, similarly sex-linked conditions, such as premenopause.

This straightforward conclusion is supported by the history of the PDA. The immediate impetus for the PDA's amendments to Title VII was the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that discrimination on the basis of pregnancy was not encompassed in Title VII's prohibition against sex discrimination. The Supreme Court reasoned that treating "pregnant women" worse—in that case, for purposes of exclusion from disability benefits coverage—than "nonpregnant persons" did not amount to sex discrimination, because "[w]hile the first group is exclusively female, the second includes members of both sexes." *Gilbert*, 429 U.S. at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974)).

Congress responded swiftly by passing the Pregnancy Discrimination Act, and in so doing, "unambiguously expressed its disapproval of both the holding *and the reasoning* of the Court in the *Gilbert* decision." *Newport News*, 462 U.S. at 678 (emphasis added); *see also Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272,

284-85 (1987) ("By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*."); *AT&T Corp. v. Hulteen*, 556 U.S. 701, 705 (2009) ("In 1978, Congress amended Title VII by passing the PDA, 92 Stat. 2076, 42 U.S.C. § 2000e(k), which superseded *Gilbert* . . . ."). The PDA's core purpose was to prohibit discrimination against women based on "'the whole range of matters concerning the childbearing process,' and [to give] women 'the right . . . to be financially and legally protected before, during, and after [their] pregnancies.'" U.S. Equal Emp. Opportunity Comm'n, No. 915.003, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (2015) (quoting H.R. Rep. No. 95-948, 95th Cong., at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749 and 124 Cong. Rec. 38,574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin)). Thus, the PDA adopts the view—which had been espoused by the dissent in *Gilbert*—that discrimination on the basis of a sex-linked condition like pregnancy constitutes the very definition of sex discrimination. *See Gilbert*, 429 U.S. at 161-62 (Stevens, J., dissenting) (observing that the exclusion of pregnancy "by definition . . . discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male"); *Guerra*, 479 U.S. at 277 n.6 ("The legislative history of the PDA reflects Congress' approval of the views of the dissenters in *Gilbert*.").

Congress further intended the PDA to expansively prohibit discrimination on the basis of all kinds of sex-linked conditions, especially those having to do with reproduction, in response to the outdated view that women's reproductive function somehow diminishes their ability to fully participate in the workplace. *See City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))). This type of stereotype, which was for decades codified in laws, court decisions, and employer policies, was precisely what Congress targeted in enacting Title VII and the PDA. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (recognizing Title VII's purpose to move society "beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 641 n.9 (1974) (invalidating a mandatory pregnancy leave rule for teachers on constitutional grounds and noting that the invalid regulations "may have originally been inspired" by "outmoded taboos" about pregnancy); *Sprogis*, 444 F.2d at 1198 (striking down airline's policy against employing married flight attendants); *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) ("[T]he notions that

mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based.").

For these reasons, the Supreme Court has held that discrimination on the basis of conditions linked to sex and reproductive capacity—even if not directly targeted against pregnant women—is covered under Title VII. For example, in *Johnson Controls*, the Court considered a workplace policy that prohibited all female employees of childbearing age from working in certain positions due to hazards from exposure to lead, on the ground that exposure was known to cause birth defects to fetuses exposed in utero. 499 U.S. at 190-92. The Court rejected the notion that the PDA only prohibits discrimination on the basis of actual pregnancy, holding that under the PDA, a classification based on "potential for pregnancy . . . must be regarded, for Title VII purposes, in the same light as explicit sex discrimination." 499 U.S. at 199. *Johnson Controls* thus stands for the proposition that Title VII's protections extend to discrimination on the basis of any condition that is sex-linked and relates to women's childbearing capacity. *Id.*

Indeed, even before the PDA was enacted, the binding precedent in this Circuit had determined that employment decisions related to women's menstrual cycles were covered under Title VII. In *Harper v. Thiokol Chemical Corp*., 619 F.2d 489 (5th Cir. 1980), the Court held that an employer's policy requiring women returning from maternity leave to demonstrate that their menstrual cycles

had returned to "normal" constituted prohibited sex discrimination. *Id.* at 491-92.[4] The Court reasoned that doing so "clearly deprive[d] [them] of employment opportunities and impose[d] . . . a burden which male employees need not suffer." *Id.* Thus, binding precedent in this Circuit has already established that discrimination based on women's status with respect to whether they are menstruating regularly, or at all, falls within Title VII's ambit.

Courts have also recognized Title VII's application to a number of other sex-linked conditions related to female reproduction. *See Houston Funding*, 717 F.3d at 428 (discrimination on the basis of lactation covered under Title VII because "[a]n adverse employment action motivated by these factors clearly imposes upon women a burden that male employees need not—indeed, could not—suffer." (citing *Harper*, 619 F.2d at 491-92)); *Nalco*, 534 F.3d at 648-49 (discrimination against employee for taking time off to undergo fertility treatments stated a cognizable claim of sex discrimination because such employees, "just like those terminated for taking time off to give birth or receive other pregnancy-related care[,] will always be women").[5] Like lactation or infertility, premenopause and its

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), this Court adopted as binding precedent all decisions that the former Fifth Circuit handed down prior to October 1, 1981.

[5] *See also* E.E.O.C. Decision (Dec. 14, 2000), http://www.eeoc.gov/policy/docs/decision-contraception.html (finding that denial of prescription coverage for contraceptive drugs and devices in employer plan

symptoms, including sudden, heavy menstruation, are inextricably sex-linked conditions that cannot lawfully constitute a basis for discrimination under Title VII.

2. Premenopause and its symptoms are sex-linked conditions covered under Title VII.

The Complaint in this case also falls squarely within the category of claims covered under Title VII, because it concerns a condition that is both sex-linked and directly related to reproductive capacity. The essence of Ms. Coleman's claim is that she was fired because she was going through premenopause. She alleges that Defendant was aware of her condition, and that she was disciplined, and ultimately fired, after two occasions on which her efforts to manage the sudden-onset, heavy menstruation associated with that condition were unsuccessful. Doc. 1, ¶¶ 13, 15, 23, 24.

This condition, which by definition affects only those with female reproductive organs, is *per se* sex linked. Merriam Webster's Medical Dictionary, for example, defines "menopause" as "the natural cessation of menstruation occurring usually between the ages of 45 and 55" and "the physiological period in the life of a woman in which such cessation and the accompanying regression of

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constituted violation of Title VII as amended by the PDA, following *Johnson Controls*, 499 U.S. at 206, 211) (citing H.R. Rep. No. 948, 95th Cong., at 5 (1978) and 124 Cong. Rec. 38,574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA)).

ovarian function occurs."[6] *Menopause*, Merriam-Webster Medical Dictionary (2017), http://c.merriam-webster.com/medlineplus/menopause. "Premenopause," which is how Ms. Coleman characterized her own condition, is defined as "the premenopausal period of a woman's life; *especially*: perimenopause." *Premenopause*, Merriam-Webster Medical Dictionary (2017), http://c.merriam-webster.com/medlineplus/premenopause. "Perimenopause" is, in turn, defined as "the period around the onset of menopause that is often marked by various physical signs (such as hot flashes and menstrual irregularity)." *Perimenopause*, Merriam-Webster Medical Dictionary (2017), http://c.merriam-webster.com/medlineplus/perimenopause. Perimenopause (or premenopause) thus refers to the beginning of a process that will ultimately result in the cessation of a woman's menstrual cycle, signaling the end of her reproductive years and her capacity to become pregnant. According to the American College of Obstetricians and Gynecologists, irregular menstruation, including abnormally heavy menstruation, commonly occurs in perimenopause as a result of changes in a woman's hormone levels. *See generally*, Am. Coll. of Obstetricians &

[6] Although the record does not yet contain any evidence regarding the nature of premenopause or its symptoms because the case was dismissed at the pleading stage, the Court may look to publicly available dictionary definitions and public sources to guide its analysis. *See Boyd v. Warden, Holman Correctional Facility*, 856 F.3d 853, 868 n.1 (11th Cir. 2017); *Castillo v. U.S. Atty. Gen.*, 756 F.3d 1268, 1273 (11th Cir. 2014); *Houston Funding*, 717 F.3d at 428 (looking to dictionary definition of lactation to determine its relationship to pregnancy and childbirth).

Gynecologists, FAQ162, *Perimenopausal Bleeding and Bleeding after Menopause* (May 2011), https://www.acog.org/-/media/For-Patients/faq162.pdf?dmc=1&ts=20170810T1844110616. Because Plaintiff alleges she was fired due to a sex-linked condition that is "unique to women," Doc. 1, ¶ 38, her claims should be considered as falling squarely under Title VII's prohibition against sex discrimination.[7]

Just as the PDA prohibits discrimination on the basis of a woman's capacity to become pregnant, *see Johnson Controls*, and the perceived normalcy of a woman's menstrual cycles, *see Harper*, the PDA must also be understood as encompassing the *cessation* of a woman's reproductive capacity through the physiological process of premenopause and, ultimately, menopause. Had the District Court properly construed Ms. Coleman's allegations that she was fired because of her condition of premenopause—as it was bound to do on a motion to

[7] This brief characterizes menopause as sex-linked and refers to female reproductive capacity. It is important to recognize that a small minority of women do not go through menopause because they never menstruate; conversely, some gender non-conforming people and transgender men may experience menopause. These facts, however, do not defeat the characterization of menopause as sex-linked, as those affected by menopause are still nearly exclusively women, and it is the association between the condition of menopause and female reproductive capacity that leads to it falling under Title VII. *See, e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 678 (1983) (recognizing that when Congress enacted the Pregnancy Discrimination it rejected the reasoning of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that sex discrimination does not include pregnancy discrimination because not all women become pregnant).

dismiss, *see Twombly*, 550 U.S. at 555; *Castillo*, 603 F. App'x. at 915—it would have viewed her claim as one of "explicit sex discrimination" under Title VII, because the condition of premenopause is both linked to sex and directly related to reproductive capacity. *See Johnson Controls*, 499 U.S. at 199. The District Court erred in refusing to construe Plaintiff's Complaint in this way, and consequently finding she had failed to state a claim under Title VII.

C. Premenopause is Covered Under Title VII Because it is a Condition "Related to Pregnancy and Childbirth."

Premenopause is covered under Title VII for the additional reason that it falls within the plain text of the PDA's definition of the term "sex" as a "medical condition" that is "related to" pregnancy and childbirth. 42 U.S.C. § 2000e(k). This is so because "'related' is a generous choice of wording, suggesting that interpretation should favor inclusion rather than exclusion in the close cases." *Pacourek*, 858 F. Supp. at 1402. The District Court's conclusion to the contrary defies reason and medical reality.

As discussed above, premenopause and menopause represent women's transition from fertility to infertility due to the function of age or other physiological triggers. Once a woman has undergone menopause, she loses the capacity to become pregnant and bear children. As a result, the plain language of the PDA mandates the conclusion that premenopause and menopause are "related to" pregnancy and childbirth. *See id.* at 1403 ("In ordinary terms, a medical

condition related to the ability of a woman to have a child is related to pregnancy and childbirth."); *Houston Funding*, 717 F.3d at 428 n.4 (lactation is "related to" pregnancy and child birth).

The District Court's holding that Ms. Coleman's condition of "excessive menstruation" was related to "pre-menopause, not pregnancy or childbirth," Doc. 12, p.5, is thus logically flawed. Premenopause *is* related to pregnancy and childbirth because it regulates reproductive capacity, so that any of its symptoms are also covered by the explicit language of the PDA. *See Pacourek*, 858 F. Supp. at 1402. For example, imagine that an employee had been pregnant and alleged that she was terminated after her water broke suddenly, resulting in "soiling" company property. Under those circumstances, the court would likely have had little difficulty concluding that the allegations raised viable claims under the PDA. Any defense that her claim was barred because her termination was technically due to the "symptom" of her water breaking, and not because of her pregnancy, would be a logical fallacy that would be rejected on a motion to dismiss.[8] For these

[8] Moreover, as discussed further in Section III, below, in this hypothetical the question of whether the true reason for the termination was the soiling of company property or the breaking of a plaintiff's water would at best have been considered a factual question regarding whether the proffered reason for the termination was pretext, and thus, would at minimum have been permitted to proceed to discovery. *See Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316 (11th Cir. 2012) (fact issue as to employer's motivation precluded summary judgment). To rule that

reasons, courts have interpreted the PDA as covering a range of physiological conditions *and* their symptoms as being "medical conditions" "related" to "pregnancy and childbirth." *See, e.g.*, *Houston Funding*, 717 F.3d at 428 (lactation is covered under Title VII both because it is a condition unique to women and because it is a "medical condition" that is related to pregnancy and childbirth); *C.A.R.S. Prot. Plus*, 527 F.3d at 364, *order clarified*, 543 F.3d 178 (3d Cir. 2008) (termination of pregnancy is included in the term "related medical conditions"); *Walsh v. Nat'l Comput. Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) (sustaining jury verdict for employee who faced hostile work environment upon return to work after maternity leave, based on her "potential to become pregnant again"); *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) ("In light of the plain language of the statute, the legislative history of the PDA, the E.E.O.C. guidelines, and the principles of *Johnson Controls*, . . . an employer who discriminates against a female employee because she has 'exercised her right to have an abortion' violates Title VII."); *Allen Brown v. District of Columbia*, 174 F. Supp. 3d 463, 478-480 (D.D.C. 2016) (lactation is covered under Title VII because it is unique to women and "related to" pregnancy and childbirth); *Hicks v. City of Tuscaloosa*, No. 7:13-CV-02063, 2015 WL 6123209, at *18-19 (N.D. Ala. Oct. 19, 2015)

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such allegations were not covered under the PDA *as a matter of law* would be legal error. The result should be no different here.

(both post-partum depression and lactation are medical conditions "related to" pregnancy and childbirth), *appeal docketed*, No. 16-13003 (11th Cir. May 27, 2017); *Briggs v. Women in Need, Inc.*, 819 F. Supp. 2d 119, 127 (E.D.N.Y. 2011) (recovery from birth by cesarean section is a medical condition related to pregnancy).[9] The District Court's holding as a matter of law that Plaintiff's condition was not covered as pregnancy-related under the terms of the PDA because her *symptoms* were unrelated to pregnancy was therefore erroneous.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CASE ON THE GROUND THAT SHE HAD FAILED TO PLEAD A *PRIMA FACIE* CASE OR IDENTIFY A MALE COMPARATOR.

The District Court further erred in dismissing the Ms. Coleman's case on the ground that she had failed to allege that male employees "who soiled themselves and company property due to a medical condition, such as incontinence, would have been treated more favorably." Doc. 12, p.6. The District Court's reliance on

[9] Moreover, premenopause constitutes a "medical condition" for purposes of the PDA, as menopause and premenopause are phases in women's reproductive lives that are the subject of both routine and specialized medical care and treatment, as well as a body of research and medical specialization. *See, e.g.*, Jan L. Shifren & Margery L.S. Gass, *The North American Menopause Society Recommendations for Clinical Care of Midlife Women*, 21 Menopause 1038 (2014); Am. Coll. of Obstetricians & Gynecologists, FAQ047, *The Menopause Years* (May 2015), https://www.acog.org/-/media/For-Patients/faq047.pdf?dmc=1&ts=20170810T1421314683; *see also* Am. Coll. of Obstetricians & Gynecologists, FAQ162, *Perimenopausal Bleeding and Bleeding After Menopause* (May 2011), https://www.acog.org/-/media/For-Patients/faq162.pdf?dmc=1&ts=20170730T1503274558/.

Plaintiff's failure to allege a similarly situated male employee was flawed for two reasons. First, it effectively required her to satisfy the fourth prong of the *prima facie* case—establishing circumstances giving rise to an inference of discrimination—an evidentiary requirement that is not required at the pleading stage. *See Surtain*, 789 F.3d at 1245-46; *see also Smith*, 644 F.3d at 1328 (*prima facie* case not required at summary judgment). Second, it is contrary to settled law in this Circuit, which recognizes many methods of demonstrating an employer's discriminatory motive *other than* the identification of a male comparator. *Hamilton*, 680 F.3d at 1320 ; *Smith*, 644 F.3d at 1328.

Plaintiffs attempting to prove sex discrimination may introduce direct evidence of discrimination, such as facially discriminatory policies or statements that the employer's adverse action was motivated by a prohibited basis, *see Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), or they may attempt to prove their claim through circumstantial evidence using the familiar "burden-shifting" framework outlined in *McDonnell Douglas*, 411 U.S. 792 (1973). The latter approach requires the plaintiff to show that (1) she was a member of a protected class, (2) she was qualified for the position, and that (3) she suffered adverse action (4) under circumstances that give rise to an inference of discrimination. *Smith*, 644 F.3d at 1325; *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-3 (1981).

As the Supreme Court has emphasized, the *McDonnell Douglas* burden-shifting framework is an evidentiary standard, not a pleading standard. *Swierkiewicz*, 534 U.S. at 510. Thus, a Title VII discrimination complaint need not allege a *prima facie* case to survive a motion to dismiss. *Id.* at 511. Rather, "a complaint need only provide enough factual matter (taken as true) to suggest intentional [sex] discrimination." *Surtain*, 789 F.3d at 1245-46 (finding that the district court abused its discretion by incorrectly applying the *McDonnell Douglas* standard at the pleading stage) (internal quotation marks omitted); *accord Castillo*, 603 F. App'x at 919 (reversing district court's grant of motion to dismiss, stating that the "conclusion that [the plaintiff] must, at this stage, satisfy the *prima facie* showing required by *McDonnell Douglas* is inconsistent with Supreme Court precedent"). *See also McCone v. Pitney Bowes, Inc.*, 582 F. App'x 798, 801 (11th Cir. 2014) (noting that *Swierkiewicz*'s holding remains good law even after *Iqbal* and *Twombly*).[10]

[10] As both the Supreme Court and this Court have recognized, requiring plaintiffs to plead the elements of a *prima facie* case is conceptually flawed because the *McDonnell Douglas* framework is intended only for discrimination cases relying on circumstantial evidence, and does not apply to direct evidence or mixed-motive cases. *See Swierkiewicz*, 534 U.S. at 511; *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1239 (11th Cir. 2016) (holding that the summary judgment standard for a mixed-motive discrimination case is not the *McDonnell Douglas* standard, but rather, "whether the plaintiff has presented sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [her protected

Moreover, Ms. Coleman is not required to identify a male comparator in order to plausibly allege discrimination. *See Swierkiewicz*, 534 U.S. at 510; *Smith*, 644 F.3d at 1328 (holding that "the plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case," even at summary judgment); Comparator evidence is one way, but not the only way, to establish discriminatory motive. *Hamilton*, 680 F.3d at 1320 (a plaintiff may make a showing of pretext even in the absence of evidence of a male comparator by using other circumstantial evidence); *see also Legg v. Ulster Cty.*, 820 F.3d 67, 74 (2d Cir. 2016) (existence of policy of accommodating employees injured on the job, without further explanation, was *per se* sufficient to permit a jury to conclude the policy was motivated by discriminatory intent, even in absence of individual comparators provided accommodations).

This principle is aptly illustrated by the Complaint in this case, which alleges that "heavy menstrual flow of an unexpected nature was not an event for which males were counseled and punished." Doc. 1, ¶ 17. Indeed, the line of cases related to discrimination based on female reproductive capacity recognizes that in such cases, there can be no comparator.[11] *See Houston Funding*, 717 F.3d at 428;

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characteristic] was a motivating factor for [an] adverse employment decision" (internal quotation marks omitted)).

[11] This allegation is sufficient in itself, but should the Court determine that Ms. Coleman's factual allegations do not suffice, the Court should at a minimum

Harper, 619 F.2d at 491-92. The District Court's requirement that Ms. Coleman identify a male comparator is thus pure error not only because the Supreme Court and this Court have held that the *McDonnell Douglas* framework need not be pled, *see Swierkiewicz*, 534 U.S. at 510; *Smith*, 644 F.3d at 1328, but also because this Court has explicitly held that the identification of a male comparator is not necessary to establish a triable case for sex-based discrimination, *Hamilton*, 680 F.3d at 1320.

Moreover, in this case, a male comparator is unnecessary because the temporal proximity between the adverse employment actions related to Ms. Coleman's premenopausal condition, including the verbal reprimand and termination, were sufficient to support an ultimate inference of discrimination based on her sex. Ms. Coleman suffered from premenopause resulting in sudden-onset, heavy periods that were difficult to predict. Doc. 1, ¶¶ 10-11. Defendant was aware of her condition and its effects. *Id.* ¶ 13. Ms. Coleman alleges that, immediately after the first incident of leakage occurred, Defendant reprimanded

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reverse the dismissal—which did not specify whether it was with or without prejudice—and direct the District Court to enter a dismissal without prejudice in order to permit Plaintiff, with the assistance of her new counsel, to file an amended complaint. *See Brisson v. Ford Motor Co.*, 349 Fed. App'x 433, 435 (11th Cir. 2009) (remanding to permit filing of amended complaint where district court had *sua sponte* ruled on futility and directed plaintiffs not to seek leave to amend); *Patel v. Diplomat 1419VA Hotels, LLC*, 605 Fed. App'x 965 (11th Cir. 2015) (holding district court erred in dismissing case without addressing whether dismissal was with or without prejudice).

her and warned her that she "would be fired if she ever soiled another chair *from sudden onset menstrual flow*." *Id.* ¶ 15 (emphasis added). And as soon as such an incident did reoccur, she was immediately disciplined and relieved from duty, forcing her to miss her weekend shifts, and then fired the following Monday. *Id.* ¶ 23. Defendant thus expressly linked Ms. Coleman's discipline and ultimate termination to her "sudden-onset menstrual flow," which Defendant knew to be related to her premenopause. *Id.* ¶¶ 13, 23, 24. These allegations, if proven, are sufficient to raise an inference, under either a direct or indirect evidence theory, that her termination was the immediate result of the symptoms she was suffering as a result of premenopause, and thus, as argued above, because of her sex.

The District Court therefore erred in dismissing her case for failure to allege a male comparator who was treated better than she was, as that is not required in order to prevail even at summary judgment, much less at the pleading stage. The District Court's decision must therefore be reversed.

III. THE DISTRICT COURT ERRED IN ACCEPTING DEFENDANT'S REASON FOR TERMINATING PLAINTIFF ON A MOTION TO DISMISS.

Finally, the District Court erred in finding that Ms. Coleman was "not terminated simply because she was pre-menopausal or menstruating," but "for being unable to control the heavy menstruation and soiling herself and company

property." Doc. 12, p.5-6. In making this determination, the District Court appears to have accepted the reason Defendant gave for her termination—that it was due not to her condition of premenopause, but to her "failure to maintain high standards of personal hygiene." Doc. 1, ¶ 24. This finding was inappropriate at the pleading stage, and reflects a failure to accept as true Ms. Coleman's allegations regarding the real reason for her termination, or to view them in the most favorable light, as it was bound to do on a motion to dismiss. *See Twombly*, 550 U.S. at 555; *Castillo*, 603 F. App'x. at 915; *E.E.O.C. v. J & R Baker Farms, LLC*, No. 7:14-CV-136, 2015 WL 4753812, at *4 (M.D. Ga. Aug. 11, 2015) ("[W]hether or not there is some alternative, non-discriminatory reason for the [adverse action] has yet to be seen. But that is not the standard at this stage.").

As a consequence, Ms. Coleman was completely deprived of the opportunity to rebut the employer's reason for her termination and demonstrate that it was pretext, and ultimately, to prove that the true reason for her termination was as she has alleged: her condition of premenopause and its symptoms. *See McDonnell Douglas*, 411 U.S. at 806-07; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515-16 (1993). Moreover, Plaintiff was deprived of the opportunity to prove that her sex or a condition related to pregnancy was a motivating factor for the employer's decision to take an adverse employment action against her, even if the reason the employer offered also partially motivated that decision. *See Quigg v. Thomas Cty.*

Sch. Dist., 814 F.3d 1227, 1239-40 (11th Cir. 2016) (holding that a plaintiff alleging a Title VII discrimination claim under a mixed motive theory need not prove pretext under the *McDonnell Douglas* framework and instead need only present evidence sufficient to convince a jury that: "(1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was *a* motivating factor for the defendant's adverse employment action" (citations omitted) (emphasis in original)).

Ms. Coleman should have been afforded the chance, for example, to take discovery of her supervisors regarding their motives, and attempt to determine whether their explanations were consistent. *See Hamilton*, 680 F.3d at 1320 (evidence supported finding of pretext where employer had given inconsistent explanations for termination and suggested it was due to inconvenience caused by pregnancy). And, because comparator evidence is one (although not the only), valid method of demonstrating pretext, *see id.*, she should have been permitted to seek evidence on whether other employees had been subjected to discipline for any other hygiene-related incidents that were not related to menopause or menstruation (like incontinence, as the District Court suggested, or nosebleeds)—or indeed, whether any other employee had been disciplined for "soiling company property" for any other reason, such as spilling coffee or failing to tidy up the workspace after eating lunch. Should she succeed following discovery in presenting sufficient

evidence of pretext to create a material factual dispute, she should be permitted to present her case to a jury for a determination by the finder of fact. *See Burdine*, 450 U.S. at 255 n.10 (recognizing that pretext is often a question of fact); *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1559 (11th Cir. 1998) (determinations of credibility and weight of evidence on issue of pretext are questions "reserved for the trier of fact"). Because the Court's factual finding on this ultimate question of Defendant's true motive was inappropriate at the pleading stage, the decision below must be reversed.

CONCLUSION

Discrimination on the basis of premenopausal condition violates Title VII because the condition is a sex-linked trait related to reproductive capacity and is otherwise a "medical condition" "related to" "pregnancy and childbirth." 42 U.S.C. § 2000e(k). Furthermore, Ms. Coleman was not required to satisfy her *prima facie* case or identify a male comparator at the motion to dismiss stage, *Swierkiewicz*, 534 U.S. at 510; *Smith*, 644 F.3d at 1328; *Hamilton*, 680 F.3d at 1320; nor was it proper for the District Court to credit Defendant's proffered justification for her termination at that stage, *see McDonnell Douglas*, 411 U.S. at 806-07.

Accordingly, the District Court's decision should be reversed and vacated, and the case should be remanded for further proceedings.

Respectfully submitted,

Dated: August 14, 2017

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 7,934 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting feature of Microsoft Office 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: August 14, 2017

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CERTIFICATE OF SERVICE

I, Galen Sherwin, do hereby certify that I have filed the foregoing Brief electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on August 14, 2017. I further certify that upon receiving notification from the Court that the electronic version of the Brief has been accepted and docketed, one true and correct paper copy of the Brief will be sent via first-class mail to counsel of record.

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